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At the Supreme Court Sitting as the High Court of Justice

HCJ 8806/10

Before: **Honorable Justice M. Naor**
Honorable Justice E. Hayut
Honorable Justice H. Melcer

The Petitioner: **Regavim**

v.

The Respondents: **1. Prime Minister**
2. Minister of Defence
3. GOC Central Command
4. Head of the Civil Administration
5. Head of Beit Sira Village Council

Petition for *Order Nisi* and *Interim Order*

Session date: 9 Tamuz 5771 (July 11, 2011)

Representing the Petitioner: Adv. Amir Fisher

Representing Respondents 1-4: Adv. Nachi Ben Or

Representing Respondent 5: Adv. Taufik Jabarin

Judgment

Justice E. Hayut:

In the petition before us the petitioner requests the court to order respondents 1-4 (hereinafter: the **respondents**) to explain why they do not take all necessary actions for the issue of a demolition order or for the execution of a demolition order against a school located in the Beit Sira area, in close proximity to route 443, which was in the process of being unlawfully erected without a permit (hereinafter: the **structure**) when the petition was filed. In addition, the petitioner requests that the respondents specify the reasons for their failure to establish a time schedule for the issue and execution of a demolition order against the structure. In the petition, an interim order was also requested which would direct respondent 5

and anyone on his behalf to stop all construction and infrastructure works in the structure and to refrain from the execution of any transaction with respect thereof and from having it occupied until a decision is made in the petition. In addition, a temporary order was requested until a decision in the request for the interim order is made.

The petition was initially heard together with another petition (HCJ 8902/10) which was filed by the Beit Sira Village Council (hereinafter: the **council**) in which the revocation of the demolition order which was issued against the structure was requested, but said petition was withdrawn at the request of the Council, as will be described below.

Relevant Factual Background

1. The petition concerns, as aforesaid, a structure which serves as a school and which was erected without a permit as required by law. On August 3, 2010, shortly after the existence of the structure was brought to respondents' attention, a stop work order was issued with respect thereof which was directed against the council, and those holding possession of the structure were summoned to appear before the Construction Supervisory Subcommittee of the Supreme Planning Council (hereinafter: the **supervisory subcommittee**). Before the hearing, the council's counsel wrote to the supervisory subcommittee and argued that the structure was located in Area B, but notified that for cautionary reasons an application for a building permit would be submitted, and requested to postpone the scheduled hearing until after a decision was made as to whether the case indeed concerned Area B, or until after an application for a permit shall have been submitted as aforesaid. The hearing before the supervisory committee was held as scheduled, in which the representative of the civil administration infrastructure division stated that the structure was located in Area C. Against this backdrop the supervisory committee issued a final order for the cessation of the work and for the demolition of the structure, and granted a 30 day extension for the realization of the order, the submission of an application for a building permit or the taking of any other action as the council may deem fit. On September 1, 2010, the order was delivered to the council's counsel. Thereafter, the council submitted to the supervisory committee an application for a building permit, but its application was denied on the grounds that an appropriate document concerning the ownership in the land had not been submitted.

The petitioner, which has already turned to the respondents on July 14, 2010, and requested that immediate enforcement actions be taken against the structure, turned to the respondents again on this matter and was notified by respondent 4, on November 7, 2010, that planning enforcement proceedings were taken against the unlawful construction works in the area of route 443, that orders were delivered according to the applicable legislation, and that the orders would be realized "according to priorities and resources, in view of the entire considerations relevant to this matter." Against this backdrop, the petitioner filed on November 30, 2010 the petition at hand, which argued that respondent 5 and those acting on his behalf completely disregarded the stop work order which was issued and were vigorously promoting the construction works without any interference, and that in view of respondent's brazen omission to enforce the orders which were issued by them, the petitioner had no alternative but to turn to this court. According to the petition, on the date it was filed the structure was in final construction stages and was about to be occupied within several weeks.

The arguments of the parties

2. The petitioner argues that the construction of the structure constitutes "part of an organized and declared plan of the Palestinian Authority to build schools and mosques in Area C in Judea Samaria and Binyamin", which is intended, according to it, to establish facts on scene and strengthen the hold of the Palestinian Authority in areas which are under Israeli control. Within the framework of

this plan, which is allegedly lead by the leadership of the Palestinian Authority, and which is mostly financed by foreign organizations and entities, extensive building activity takes place of public buildings which "spring up like mushrooms" all over Area C, the purpose of which is to gain control over areas having strategic importance, close to main transportation arteries, and in so doing, tie the hands of the state of Israel in future negotiations with the Palestinian Authority. The petitioner brings as an example two additional schools which are allegedly built according to the same plan. The petitioner argues that, considering the fact that this case concerns an unlawful, organized, declared and systematic construction in a very wide scope, which is lead by a "hostile authority", the enforcement authorities should have put the structure being the subject matter of the petition, at the top of their priorities. The petitioner argues further that according to the state itself taking enforcement actions against a populated school is problematic, and therefore said large structure which is under intensive construction and has not yet been occupied, is anyway at the top of respondents' own declared priorities. The petitioner argues that under the circumstances of the matter, and in view of recent judgments of this court, the respondents can no longer "hide" behind the argument of "order of enforcement priorities", and should demolish the structure, or at least set a schedule therefore. The petitioner is of the opinion that respondents' failure to enforce the law against the structure constitutes part of their total disavowal of the obligation to enforce the planning and building laws on the Palestinian population in the Area, and that the policy applied by them is unreasonable and discriminatory against the Jewish inhabitants of the Area. Finally, the petitioner argues that the response given to it by respondent 4 does not comply with the obligation to give reasons imposed on him pursuant to the Administrative Procedure Amendments (Decisions and Statements of Reasons) Law, 5718-1958, and that all of its applications were responded in a uniform and laconic manner regardless of the circumstances of the matter and the place of the structure in the order of priorities established by the enforcement authorities.

3. In their response to the petition the respondents argued that the petition should be summarily dismissed. They argue that supervision and enforcement activities concerning unlawful construction in the Area are taken according to the order of priorities outlined by the competent authorities, and that the rule is, that with respect to the order of priorities according to which the planning and building laws are enforced, they are vested with broad discretion. It was further argued that to the extent that the authority does not completely renounce its obligation to enforce the law, the court will not intervene, as a general rule, in the scope of the enforcement, and even more so, in the order of priorities and time schedule established for the enforcement. According to the respondents, the main considerations which are taken into account for the purpose of establishing the order of priorities concerning enforcement in the Palestinian sector are security considerations, including the proximity to the seam line or to sensitive facilities, considerations concerning proximity to settlements, considerations concerning ownership of the land and substantial planning considerations. The respondents argue that in the case at hand, no considerations exist which put the structure at the top of the order of priorities. On the contrary – *prima facie*, some considerations give it a relatively low priority. Thus, the structure is located at a significant distance of about 700 meters from central transportation arteries, and is located in close proximity to Area B and the territorial boundaries of the Beit Sira village. The respondents note further that the structure is intended to be used as a school, and that it was already in advanced stages of construction when the file in respect thereof was opened. The respondents are therefore of the opinion that in view of all of the above circumstances, there is no cause for intervention in their decisions concerning enforcement activities against unlawful construction in the Area, in general, and concerning the structure being the subject matter of the petition, in particular, and they should not be ordered to enforce the orders against the structure, *in lieu* of handling other construction violations which were given higher priority, especially violations of suspension orders and demolition of unlawful structures which pose a security threat. To complete the picture, the respondents note that from the beginning of 2011 and until the end of May, 134 unlawful structures

were demolished in the Palestinian sector, 105 demolitions were carried out by the supervisory unit of the civil administration and the rest were carried out by the holders of the structures following supervision proceedings. During said period, 33 unlawful structures were also demolished in the Israeli sector in the Area, 29 of which were demolished by the supervisory unit.

4. Respondent 5, head of the council, also argues that the petition should be denied, both summarily and on its merits. According to him, the structure being the subject matter of the petition was erected in view of the fact that the schools currently located in the village area no longer satisfy the needs of the growing population, and that ever since 1960, not even one school class has been built in the area. The council, so it was argued, made extensive efforts to convince the Palestinian Authority to allocate budget for the construction of the school, and located private land which it ascertained was situated in Area B – an area under the civil control of the Palestinian Authority – for the purpose of obtaining a building permit and financing for the erection of the school from the Palestinian Authority. Following efforts which were carried out over a few years, the council acquired the land, and on May 5, 2010 the planning institute of the Palestinian Authority issued a building permit for the structure. Respondent 5 argues that the council and those heading it were astounded by the stop work order which was issued against the structure, since they were certain that the structure was erected in Area B. He emphasizes that the council is a law abiding entity and had it not been duly granted a permit as required by law it would not have erected the school. Respondent 5 further describes the applications which were submitted by the council to the supervisory committee for relaxations of the required proof of ownership of land and for an extension of the submission date of the ownership documents with respect thereto. According to him, in view of the fact that said applications remained unanswered, the council's petition (HCJ 8902/10) was filed, and this petition should not be heard before the council's above petition is heard and decided on. Respondent 5 further argues that the structure of the school poses no security threat and that under the circumstances there is no cause to intervene with respondents' decisions which are based on the order of priorities which was set by them for the enforcement of the law on unlawful construction in the Area. Respondent 5 also argues that the petitioner omitted important facts from its petition and that the petition was submitted with unclean hands, in view of the fact that outside the court room the petitioner stated that its real objective was to deter Palestinians from filing petitions against unlawful construction of Jewish inhabitants of the Area, and cause the court to refrain from hearing such petitions. Respondent 5 is of the opinion that petitioner's hands are unclean also because, contrary to the situation which was presented by it, the construction of the school has almost been completed and in the next few months the children will commence studying therein (the response was submitted on January 9, 2011). Therefore, it was so argued, the petition was filed in a considerable delay.

The temporary order and its breach

5. In the petition which was filed by it (HCJ 8902/10), the council requested that an interim order be issued which would prohibit the execution of the demolition order. Due to an attorneys' strike, no response was submitted to the request for an interim order, and in a decision dated December 28, 2010 an interim order was granted in HCJ 8902/10, which prohibited the execution of the demolition order. Thereafter, on January 30, 2011, a temporary order was issued in the petition at hand, according to which until any further decision was made, the works in the structure being the subject matter of the petition should cease, and no transaction concerning the structure or the occupancy thereof should be carried out.

A panel of three Justices was designated to hear the petition at hand, but before any hearing took place, the petitioner requested, on February 23, 2011 to turn the temporary order into an interim order and to schedule an urgent hearing in petition. The petitioner noted that "respondent 5 disregarded the provisions of the temporary order and continued with the construction of the

structure in breach of the judicial order." Therefore, the petitioner requested further that an *order nisi* be issued in this petition, in view of the declared position of the Minister of Defence, according to which the handing of cases in which judicial orders were violated, was given top priority, as far as the execution of demolition orders in the Area was concerned. Respondent 5 argued in his response to the request that it had no factual basis and that "there was no violation of the court's order". Against this backdrop, the court denied petitioner's request in a decision dated March 6, 2011, and noted that its arguments had no basis. Shortly thereafter, respondents' response to petitioner's request was provided to the court, which stated that following the temporary order which was issued in this petition, the supervisory agencies were directed to stop the works in the structure and prevent the occupancy thereof, taking into consideration the interim order which was issued in HCJ 8902/10, which prohibited the demolition of the structure until further decision was made in this matter. The respondents reported that visits made by the civil administration supervisory unit revealed that the construction on scene continued, and that those in charge of the work were warned that they were committing a criminal offense and that should the work continue a complaint would be filed against them with the police and confiscation of equipment would be carried out. Another visit which was made on February 13, 2011 revealed that the construction continued contrary to the orders which were issued by the respondents and contrary to the temporary order which was granted in this petition. In view of the above, construction equipment was confiscated. In addition, the supervisory unit filed a complaint with the police concerning a breach of statutory duty and an investigation of the matter has commenced. Hence, the respondents argued that they took action and that they were still taking action for the enforcement of the stop work order and the demolition order as well as for the enforcement of the temporary order issued by this court and that petitioners' request, as far as it pertained to them – should be dismissed. Following respondents' response, an additional decision was given on March 7, 2011, which stated that the picture which arose from respondents' response was completely different from that which arose from respondent 5's response. It was further decided that the temporary order would remain in force, but that respondents' response would be brought to the attention of the panel which would hear the petition and would be taken into consideration in making a decision therein.

About a month later, on April 6, 2011, the petitioner notified the court that respondent 5 completed the construction of the structure and that the structure was populated, in violation of the temporary order which was issued in the petition. The petitioner therefore requested to schedule an urgent hearing in the petition, to revoke the interim order which was issued in HCJ 8902/10, and to the extent that the state did not inform of the immediate demolition of the structure, to issue an *order nisi* directing it to show cause why it should not do it in view of the violation of the temporary order as described above. The petitioner noted further that an updated aerial photograph indicated that the construction of two additional structures has commenced without a permit in the structure's yard and adjacent to the structure's premises.

6. In an updating notice which was submitted on July 7, 2011, a few days before the date which was scheduled for the hearing of the petitions, the respondents advised that according to information received from the supervisory unit, one of two visits which were made in the structure revealed that works continued to take place therein, however, in the absence of sufficient security forces, confiscation of equipment was not carried out. On April 28, 2011, another visit was made on scene during which it became evident that the construction of the structure had been completed and it served as a school. With respect to the investigation of the complaint which was filed by the supervisory unit concerning a breach of a statutory duty, it was stated that respondent 5 was summoned for an interrogation and denied any connection to the structure other than the fact that in the past he had submitted a request for a building permit, which was denied. Respondent 5 noted further that the Palestinian Ministry of Education was solely responsible for the construction, which was also funded by it. The respondents noted that said statements did not reconcile with the

arguments made by the council in HCJ 8902/10, which indicated that the construction of the structure was initiated and executed by it. The respondent also updated that the attempts made by the police to locate the contractor who built the structure were unsuccessful, and that upon the conclusion of the investigation the file was transferred to the military prosecution for the purpose of making a decision as to whether criminal charges should be pressed. However, upon the date on which the updating notice was filed on respondents' behalf, a decision in this matter has not yet been made.

To complete the picture it should be noted that upon the beginning of the hearing which was held on July 11, 2011 in HCJ 8902/10 and in the petition at hand, jointly, Advocate Taufik Jabarin, who represented the council (the petitioner in HCJ 8902/10) as well as petitioner 5 in the petition at hand, notified that the council retracted the petition in HCJ 8902/10. On that day a judgment was given according to which said petition was deleted, and the council was ordered to pay respondents' costs in the sum of NIS 25,000, which expresses the court's dismay of the breach of a judicial order.

The petition at hand remains to be discussed.

Discussion

7. In a considerable number of judgments the court stressed the importance of efficient enforcement, in general, and in the area of planning and building, in particular, and emphasized that in the absence of enforcement, the rule of law is prejudiced, the planning rules become a dead letter and their underlying objectives cannot be realized (see: HCJ 5377/09 **Regavim v. Minister of Defence**, paragraph 7 (not reported, August 10, 2011) (hereinafter: **Regavim**); HCJ 6243/08 **The Movement for Saving National Lands v. Minister of Defence**, paragraph 22 (not reported, December 2, 2010)(hereinafter: **The Movement for Saving National Lands**); HCJ 551/99 **Shekem Ltd. v. Director of Customs and VAT**, IsrSC 54(1) 112, 125 (2000)).

Naturally, immediate enforcement actions cannot be taken simultaneously in all sites. Therefore, order of priorities must be established. Justice A. Procaccia referred to this issue in **The Movement for Saving National Lands**, and noted:

Despite the importance of the actions for the enforcement of the law in general, and of the planning and building laws in particular, occasionally it is impossible to carry out at the same time all required enforcement actions, and an order of priorities should be established for this matter, in a successive order. The reason for this stems, firstly, from the limited enforcement forces available to the administrative authority, which do not enable comprehensive simultaneous enforcement; there may also be additional pertinent considerations which affect the order of enforcement priorities, such as the damage caused as a result of the violation of the law, and in this case as a result of the specific unlawful structure, either to the relevant social structure, or in from the aspect of the security threat; the length of time which passed since the unlawful structure has been erected may also be taken into consideration in prioritizing enforcement; the sensitive nature of the site from different aspects may also be taken into account. Hence, the specific circumstances of each and every case may project on location of the structure in the order of priorities for enforcement purposes... therefore, complex considerations dictate the order of enforcement priorities, which are mainly based on the examination of "important versus unimportant, essential and urgent

versus insignificant and of minor importance' ("**We are on the Map**" Movement, paragraph 9) (Ibid., paragraph 23).

The establishment of an order of priorities does not exonerate the authority of the obligation to enforce the law and constantly examine itself in this regard, and as has been recently held "The law is the law and order of priorities is not a magic word, and it is incumbent upon the authority to constantly examine its order of priorities and the realization thereof" (**Regavim**, paragraph 9 and see also paragraph 12). Nevertheless, as a general rule, the court does not tend to interfere with the establishment of the policy in this regard and in the formulation of the order of priorities for the enforcement of the law – including for the enforcement of the planning and building laws in the Area – unless the competent authority totally and unreasonably disavows its obligation to enforce the law, or when the order of priorities outlined by the authority is flawed by extreme unreasonableness or another material flaw which violates their lawfulness (see: **The Movement for Saving of National Lands**, paragraph 24; HCJ 1555/06 **King v. Jerusalem Municipality**, paragraphs 3-4 (not reported, May 15, 2006); HCJ 1161/06 "**We are on the Map**" **Movement v. Minister of Defence**, paragraph 10 (not reported, October 14, 2007); HCJ 8255/08 **Musa v. Minister of Defence**, paragraphs 7-8 (not reported, September 1, 2010); HCJ 4475/09 **Salman v. Minister of Defence**, paragraph 14 (not reported, August 8, 2010)(hereinafter: **Salman**); HCJ 6288/09 **Ar'arah v. Director of the Civil Administration for Judea and Samaria**, paragraph 12 (not reported, March 2, 2010)).

8. In the case at hand, we were not convinced that respondents' enforcement policy or that the order of priorities established by them were flawed to the extent which justified our intervention. According to the respondents, the main considerations which guided them for the purpose of establishing the order of priorities for the enforcement of the planning and building laws on the Palestinian sector in the Area were security considerations, including, *inter alia*, proximity to the seam line or to sensitive facilities, proximity to settlements, considerations pertaining to the ownership of the land and substantial planning considerations. The relevant considerations in this case concern the fact that the structure is located in a considerable distance from main traffic arteries and in close proximity to area B and the Beit Sira village, and the fact that it is intended to serve as a school for about four hundred students. Another consideration which was taken into account was the fact that when the file was opened the structure was already in advanced construction stages. In the hearing, respondents' counsel added that weight in this case was also given to the fact that the European Union was involved in the erection of the school, and that given the array of the considerations specified above, the realization of the demolition order in this case had a relatively low priority in the current order of priorities.

As aforesaid, we did not find any flaw in the considerations which were taken into account by the respondents or in the enforcement policy implemented by them in the case at hand. Nevertheless, the fact that the erection of the structure continued and even ended in contrary with the stop work and demolition order and in contrary with the temporary order which was issued in the petition, carries, in our view, a considerable weight. It increases the existing need to realize the enforcement actions against the structure, and requires that the array of considerations relevant to this matter are re-examined and properly balanced. In the hearing, respondents' counsel indeed stated before us that this new piece of information would be taken into consideration and balanced against the other considerations which were specified above. We have no reason to doubt that the respondents would act accordingly (see and compare **Salman**, paragraphs 11, 15), in conjunction with the actions which were taken and which would, presumably, be taken on the criminal level, against the violation of the orders.

9. For the above reasons the petition should be denied.

No order for costs is given.

Parenthetically, it should be added that under the current circumstances, the determination of the competent authorities that the structure was erected in area C and that its erection was subject to the issue of a building permit by the Israeli authorities, remains in force. Nonetheless, respondents' counsel noted before us that should the council present adequate documents to substantiate its argument that the school was located in area B, the matter would be examined by the competent authorities and we do not express any opinion on this matter.

Justice

Justice M. Naor:

I concur.

Justice

Justice H. Melcer:

I concur.

Justice

Resolved as by Justice E. Hayut in her judgment.

Given today, 5 Elul 5771 (September 4, 2011).

Justice

Justice

Justice